



1981

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### Recommended Citation

Ellen K. Solender, *Family Law: Parent and Child*, 35 Sw L.J. 151 (1981)  
<https://scholar.smu.edu/smulr/vol35/iss1/5>

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# FAMILY LAW: PARENT AND CHILD

by

Ellen K. Solender\*

THE survey period has been noteworthy for an absence of activity in two areas of importance to Texas family law. The Texas Legislature did not meet, and as a result there were no changes in the Family Code. Further, the United States Supreme Court did not engage in any findings on the constitutionality of the various states' parent and child laws. This hiatus in activity surely will be shortlived because the Sixty-seventh Texas Legislature already is planning changes in family statutory law, and the United States Supreme Court has indicated that it probably will take jurisdiction in a number of family law cases.<sup>1</sup> Texas courts, however, continued to interpret the Texas Family Code and to make decisions that affect the structure of Texas family law. The number of family law disputes coming to the courts has continued to rise, and the increase in the number of authorized family district courts<sup>2</sup> has created an increase in the number of appeals.

## I. STATUS

During the survey period the constitutionality of two University Interscholastic League (UIL) eligibility requirements for participation in high school athletic programs was considered. In *Kite v. Marshall*<sup>3</sup> the federal district court held unconstitutional the UIL's "summer camp rule," which prohibits a student who attends a special athletic training camp from play-

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1. See *Little v. Streater*, 101 S. Ct. 67, 66 L. Ed. 2d 19 (1980) (No. 79-6779) (probable jurisdiction noted) (concerning charges for blood tests in paternity suits); *In re Five Minor Children*, 407 A.2d 198 (Del. 1979) (concerning the constitutionally required standard in cases involving termination of the parent-child relationship), *prob. juris. noted sub nom.* *Doe v. Delaware*, 100 S. Ct. 1336, 63 L. Ed. 2d 775 (1980); *In re Lassiter*, 43 N.C. App. 525, 259 S.E.2d 336 (1979) (concerning the right of parents to have court appointed counsel when the state is advocating the termination of parental rights), *cert. granted sub nom.* *Lassiter v. Department of Social Servs.*, 101 S. Ct. 70, 66 L. Ed. 2d 21 (1980). In addition, Justice Powell, in vacating a stay order on an injunction that would continue the denial of free public education to undocumented alien children, stated that "there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction." *Certain Named and Unnamed Non-Citizen Children v. Texas*, 101 S. Ct. 12, 14, 65 L. Ed. 2d 1151, 1155 (1980). See also *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978) (Texas statute applied to deny public education to illegal aliens violates equal protection clause), *aff'd*, 628 F.2d 448 (5th Cir. 1980).

2. TEX. REV. CIV. STAT. ANN. art. 1926a, § 1.02(a) (Vernon Pam. Supp. 1965-1980) establishes additional family district courts that have jurisdiction to hear both domestic relations matters and special juvenile matters.

3. 494 F. Supp. 227, 234 (S.D. Tex. 1980).

ing in interscholastic basketball competition for a year thereafter.<sup>4</sup> Citing practically every United States Supreme Court case that deals with the importance of the parent-child relationship,<sup>5</sup> the court concluded that the summer camp rule intrudes upon the family's right to personal privacy and on the parents' right to decide the placement of their children.<sup>6</sup> Another UIL regulation, the "one year rule," was upheld in *Sullivan v. University Interscholastic League*.<sup>7</sup> The one year rule provides that a student, after moving from another district in which he has represented a high school in basketball or football, is ineligible to participate in interscholastic basketball or football for one calendar year in his new district.<sup>8</sup> The plaintiff in *Sullivan* had played basketball in Vermont prior to coming to Texas because of his father's employment transfer. The court rejected the plaintiff's contention that this rule violates the Constitution in that it infringes on the right of interstate travel.<sup>9</sup> Rather, the court found that the rule had been applied equally to everyone and that the purpose of the rule was not to punish new residents of a state, but to discourage the recruiting of high school athletes.<sup>10</sup> In addition, the court pointed out that the rule did not preclude the plaintiff from playing basketball; he merely could not play in varsity competition with other UIL teams during the one-year period.<sup>11</sup>

*Galveston Independent School District v. Boothe*<sup>12</sup> is a most unusual decision in that it sustains a trial court's injunction against the expulsion of a high school student.<sup>13</sup> The student had been expelled for possessing one-fourteenth of an ounce of marijuana while sitting in an automobile parked on a street adjacent to the school. The court of civil appeals found that the rules on which the expulsion was based did not fairly apprise the student of the type of prohibited conduct because, although the rules were clear that expulsion could result from possession of marijuana "on campus," they were not clear that "on campus" included adjacent streets.<sup>14</sup> The court based its decision solely on the vagueness of the school's regulations, which it found violated the due process clause of the fourteenth amendment, and did not rely on other constitutional grounds.<sup>15</sup> The court did not say that the school could not discipline its students; in fact it found error because the school used expulsion prior to attempting other means of

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4. *Id.* at 229.

5. *Id.* at 230-33; e.g., *Bellotti v. Baird*, 443 U.S. 662 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

6. 494 F. Supp. at 234.

7. 599 S.W.2d 860 (Tex. Civ. App.—Austin 1980, writ granted).

8. *Id.* at 862.

9. *Id.* at 865.

10. *Id.* In special situations, such as those involving the handicapped, the one-year rule may be enjoined. See *Doe v. Marshall*, 459 F. Supp. 1190, 1192 (S.D. Tex. 1978).

11. 599 S.W.2d at 865.

12. 590 S.W.2d 553 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

13. *Id.* at 558.

14. *Id.* at 557.

15. *Id.*

correction.<sup>16</sup> The court found that expulsion is a penalty that can be used only if all rules and regulations are carefully followed,<sup>17</sup> thus implying that the deprivation of an opportunity for education is a harsh remedy that should be used carefully.<sup>18</sup>

The parental liability provisions of the Texas Family Code<sup>19</sup> were interpreted in *Buie v. Longspaugh*<sup>20</sup> to mean that a parent's liability for his child's actions is limited to \$5,000 per act and not to mean that the ceiling for a number of consecutive acts is \$5,000.<sup>21</sup> In *Go International, Inc. v. Lewis*<sup>22</sup> the Texas Wrongful Death Act<sup>23</sup> was interpreted to exclude adopted children from being among the class of persons that can recover under the act for the death of a natural parent. *Lewis* concerned a cause of action by the natural children of a couple who had been negligently killed. Because the children's aunt had adopted them prior to the accident, the court held that, under the Wrongful Death Act, they were no longer children of the deceased couple.<sup>24</sup> This interpretation is in conformity with case law interpreting the workers' compensation statute.<sup>25</sup>

The courts have not yet decided whether parents can receive damages for their own suffering in connection with the negligent death of a child. Although the issue was presented in *Bedgood v. Madalin*,<sup>26</sup> the Texas Supreme Court reversed and remanded the case without deciding whether a parent who is a bystander to the death of his child has a cause of action in his own right, in addition to a wrongful death action.<sup>27</sup>

Parentage, which establishes ancestry as well as medical history and support rights, is probably the most important information a child can have. Usually a child can easily determine the identity of his mother, but the determination of the identity of his father may be difficult. A mother's

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16. *Id.* at 556.

17. *Id.*

18. Unlike expulsion, less harsh disciplinary actions have been allowed by the courts with fewer procedural safeguards. See *Pasadena Independent School Dist. v. Emmons*, 586 S.W.2d 151 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dismissed). In *Emmons* the court denied a stay during the pendency of an appeal of a disciplinary order that assigned the student to the school's guidance center for a maximum of six days. *Id.* at 153. The denial was based on the ground that no substantial and irreparable injury would occur from the enforcement of the order. *Id.*

19. TEX. FAM. CODE ANN. §§ 33.01-.03 (Vernon 1975).

20. 598 S.W.2d 673 (Tex. Civ. App.—Fort Worth 1980, writ refused n.r.e.).

21. *Id.* at 676. TEX. FAM. CODE ANN. § 33.02 (Vernon 1975) provides that "[r]ecovery for damage caused by wilful and malicious conduct is limited to actual damages, not to exceed \$5,000."

22. 601 S.W.2d 495 (Tex. Civ. App.—El Paso 1980, writ refused n.r.e.).

23. TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952). The Act provides that "[a]ctions for damage arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused."

24. 601 S.W.2d at 498-99.

25. *Id.* at 499. See also *Griffith v. Christian*, 564 S.W.2d 170 (Tex. Civ. App.—Tyler 1978, no writ) (children adopted by stepfather prior to father's death were not "minor children" under the statute; relying on *Patton v. Shamburger*, 431 S.W.2d 506 (Tex. 1968)).

26. 600 S.W.2d 773 (Tex. 1980).

27. *Id.* at 775-76.

past or current marriage to a man does not necessarily establish his fatherhood in relation to a particular child, although marriage at the time of conception raises an almost irrebutable presumption of legitimacy.<sup>28</sup> Because accuracy in determining paternity is important, the Texas Legislature has established procedures for making this determination.<sup>29</sup> The procedures, which rely on blood tests as well as the testimony of the parties, should make it easier for any child to resolve questions concerning the identity of his father.<sup>30</sup> Unfortunately, the legislature included in the provision for establishing the identity of a father a one-year statute of limitations, which runs from the child's date of birth.<sup>31</sup> The courts have interpreted this statute of limitations to apply to everyone, including the child, and have not permitted any tolling of the statute during the child's minority.<sup>32</sup> In *Texas Department of Human Resources v. Chapman*<sup>33</sup> the court, in a poorly reasoned opinion, found the limitation constitutional on the basis that a child's claim to support was not totally barred.<sup>34</sup> Other Texas courts are now following the *Chapman* opinion.<sup>35</sup> No Texas court has considered other claims relating to parental identity, such as genetic heritage, which also are barred after the statute has run due to the lack of a mechanism for otherwise establishing parental identity. The fact that there is no similar statute of limitation in connection with voluntary legitimation by the father might also raise some interesting equal protection questions.<sup>36</sup>

When an action to establish paternity is brought by or on behalf of a child born prior to September 1, 1975, the effective date of the paternity statute, courts will not apply the legitimation statute retroactively.<sup>37</sup> In-

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28. See *D.W.L. v. M.J.B.C.*, 601 S.W.2d 475 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.), in which the mother who had been married at the time of conception was able to overcome the presumption of legitimacy by proving nonaccess by her husband and thus was entitled to establish, through blood tests in a paternity suit, the identity of the biological father. But see *Barcelo v. Barcelo*, 603 S.W.2d 276 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ dism'd), in which the presumption was not rebutted despite the fact that the father received a vasectomy prior to conception. See also *Brazier v. Brazier*, 597 S.W.2d 442 (Tex. Civ. App.—Beaumont 1980, no writ) (mother unable to overcome presumption of legitimacy, but terminated father's parental rights based on nonsupport).

29. See TEX. FAM. CODE ANN. §§ 13.01-.06 (Vernon Supp. 1980-1981).

30. See *Chumley v. Hall*, 601 S.W.2d 803 (Tex. Civ. App.—Dallas 1980, no writ) (former husband found to be biological father on basis of access and blood tests); *Lewis v. Johnson*, 590 S.W.2d 802 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (possible paternity established on basis of blood tests conducted by one expert, but after trial on the merits the weight of the evidence showed otherwise).

31. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980-1981).

32. See *Williams v. Luckey*, 599 S.W.2d 108, 109 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (holding that it was the intent of the legislature to prevent any tolling of this statute).

33. 570 S.W.2d 46 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

34. *Id.* at 48-50.

35. See, e.g., *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 189, 192 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

36. TEX. FAM. CODE ANN. § 13.21(e) (Vernon Supp. 1980-1981) provides that "[a] suit under this section [for voluntary legitimation] may be instituted at any time."

37. *Wynn v. Wynn*, 587 S.W.2d 790, 794 (Tex. Civ. App.—Corpus Christi 1979, no writ).

stead, the courts have held uniformly that the child has a common law right to establish paternity<sup>38</sup> and that the usual four-year statute of limitations applies.<sup>39</sup> Although this statute runs from the child's date of birth, it can be tolled during minority,<sup>40</sup> and one court has held further that even a delay of nine years in bringing the suit will not invoke the doctrine of laches.<sup>41</sup>

In addition to the lack of a time limitation on voluntary legitimation, there is also no requirement of blood tests. In *Shockome v. Hernandez*<sup>42</sup> the father petitioned not only for legitimation, but also to be named managing conservator of the child. The natural mother opposed him and moved to compel blood tests. The trial court overruled the motion and after a trial on the merits found that it would be in the best interests of the child to grant the father's petitions.<sup>43</sup> The appellate court approved the trial court's findings and pointed out that the use of blood tests in legitimation proceedings is discretionary and that the trial court had not abused its discretion in denying the tests because blood tests are time consuming and nonpaternity might have been established through other evidence.<sup>44</sup> Voluntary legitimation, when opposed by the mother, is not automatically granted on a finding that a person is a biological father; it must also be found to be in the child's best interests.<sup>45</sup> Moreover, in *Doe v. Roe*<sup>46</sup> the court of civil appeals held that a person alleging himself to be the biological father of a legitimate child is not a "party affected"<sup>47</sup> by a divorce decree that establishes the conservatorship rights of the legal parents, and that he cannot move to modify the decree so as to become a conservator himself.<sup>48</sup> This decision is certainly in accord with public policy concern-

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38. *Id.*

39. See Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). When no limitation is otherwise prescribed, TEX. REV. CIV. STAT. ANN. art. 5529 (Vernon 1958) provides that the action "shall be brought within four years next after the right to bring the same shall have accrued and not afterward."

40. TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1980-1981).

41. Prejean v. Prejean, 592 S.W.2d 660, 661 (Tex. Civ. App.—Beaumont 1979, no writ).

42. 587 S.W.2d 535 (Tex. Civ. App.—Corpus Christi 1979, no writ).

43. *Id.* at 537.

44. *Id.*

45. See *In re T.E.T.*, 603 S.W.2d 793, 797 (Tex. 1980); *In re C—D—V—*, 589 S.W.2d 543, 546 (Tex. Civ. App.—Amarillo 1979, no writ). The importance of legitimation to the children concerned was discussed by the court in *Sims v. Sims*, 589 S.W.2d 865 (Tex. Civ. App.—Fort Worth 1979, no writ), to explain why an appeal was heard and dismissed, even though it could have been dismissed for want of prosecution without being heard. Although the mother in *Sims* had opposed legitimation, the jury found that legitimation was in the best interests of the children. *Id.* at 866. The mother appealed, but failed to file any briefs or appear for the hearing. Nevertheless, the appellate court found that because the guardian ad litem had not pursued the appeal in the minors' behalf, he must have believed that by virtue of their legitimation they had "secured an advantage . . . [or not] suffered a detriment." *Id.* at 867.

46. 600 S.W.2d 378 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

47. TEX. FAM. CODE ANN. § 14.08(a) (Vernon Supp. 1980-1981) provides that only a "party affected" by a conservatorship decree may move to modify the decree.

48. 600 S.W.2d at 379-80. But cf. *Watts v. Watts*, 573 S.W.2d 864 (Tex. Civ. App.—Fort Worth 1978, no writ) (grandparent may be a "person affected").

ing the presumption of the legitimacy of children born during marriage<sup>49</sup> and with the doctrine of *res judicata*.<sup>50</sup>

Sometimes paternity cannot be established because of a lack of jurisdiction. In *In re D.N.S.*,<sup>51</sup> a paternity suit, the court held that the trial court did not have personal jurisdiction over the alleged father, a Minnesota resident, under the Family Code long-arm statute<sup>52</sup> because the father had never been in Texas.<sup>53</sup> The mother alleged that she and the child were in Texas as a result of the putative father's acts, directives, or approval. Although the mother's allegations tracked the language of the long-arm statute, the court held that this type of contact with Texas was constitutionally insufficient to obtain personal jurisdiction over the alleged father.<sup>54</sup> Lack of jurisdiction is yet another example of the problems caused by the one-year statute of limitations in paternity suits.<sup>55</sup> The man who was alleged to be the father in this suit could come to Texas next year and under present law there would be no way to establish paternity.

Status is very important in inheritance matters, and cases concerning equitable adoptions continue to arise despite the elaborate adoption provisions in the Family Code.<sup>56</sup> *Moore v. Douglas*<sup>57</sup> held that the heir in question was the adopted daughter of a deceased couple in that she had been adopted by estoppel.<sup>58</sup> The adopted daughter had lived with the deceased couple since she was three, had been given the couple's last name, and had taken care of them in their last illnesses. These factors, the court held, constituted sufficient evidence to find that there had been an implied agreement on the part of the deceased to adopt the plaintiff and that the adopted daughter had relied on the agreement.<sup>59</sup> In another case relating to status, the court dismissed a suit to enjoin an abortion brought on behalf of an unborn child.<sup>60</sup> The appellant had sought to bring the suit as next friend of the minor. Relying on the United States Supreme Court's holding in *Roe v. Wade*,<sup>61</sup> that an unborn child is not a person, the Texas court held that the appellant had no standing, because she was not representing a real party in interest.<sup>62</sup>

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49. *Sims v. Sims*, 589 S.W.2d 865, 867 (Tex. Civ. App.—Fort Worth 1979, no writ).

50. See Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 34 Sw. L.J. 159, 170 (1980).

51. 592 S.W.2d 35 (Tex. Civ. App.—Beaumont 1979, no writ).

52. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1980-1981).

53. 592 S.W.2d at 36-37.

54. *Id.* at 37; see *Kulko v. California Superior Court*, 436 U.S. 84 (1978).

55. See TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980-1981).

56. *Id.* §§ 16.01-.12 (Vernon 1975).

57. 589 S.W.2d 862 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

58. *Id.* at 865. Adoption by estoppel occurs when the promises, acts, and conduct of the deceased equitably require that those claiming under and through him be estopped from asserting that a child was not legally adopted by the deceased. See *Heien v. Crabtree*, 369 S.W.2d 28 (Tex. 1963).

59. 589 S.W.2d at 865.

60. *Brady v. Doe*, 598 S.W.2d 338, 339 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

61. 410 U.S. 113, 158 (1973).

62. 598 S.W.2d at 339.

## II. CONSERVATORSHIP

The saga of Roloff Evangelistic Enterprises and the state continues and will probably continue for several more years before the problems are resolved.<sup>63</sup> At issue is the constitutionality of the application of the Texas Child Care Licensing Act<sup>64</sup> to religious child care centers. The courts earlier had found the Act constitutional,<sup>65</sup> and the controversy now centers on enforcement. The federal courts, based on the United States Supreme Court's ruling in *Younger v. Harris*<sup>66</sup> that a federal court should abstain from interfering in state matters so long as there is an opportunity for the state to resolve the issue,<sup>67</sup> have refused to act.<sup>68</sup> In the most recent skirmish the state brought what it conceived to be a motion for contempt; the appellate court, however, held that it was not a nonappealable contempt motion, but neither was it held to be a final judgment, and therefore the appeal was dismissed.<sup>69</sup> The court pointed out that as far as any civil penalties for violation of the act were concerned, because there was no proof that the children in the home were under the age of eighteen, there was no proof of a violation.<sup>70</sup>

The right to have custody of one's children is a personal right and cannot be divested without personal jurisdiction.<sup>71</sup> Jurisdiction alone does not mean that a court should, in every instance, decide questions of custody. Because the best interests of the children are the main concern of the court, the court can choose to refrain from exercising its jurisdiction when it is shown that another court would be in a better position to make the determination. In *Cossey v. Cossey*<sup>72</sup> the parties met all the requirements for jurisdiction by the Texas court, but because the children had been in school in Louisiana for two years and the original family home was in Louisiana, the court held that it was not an abuse of discretion for the trial court to refuse to assert jurisdiction.<sup>73</sup> In *Comisky v. Comisky*<sup>74</sup> a court

63. See Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 33 Sw. L.J. 155, 164 (1979).

64. TEX. HUMAN RES. CODE ANN. §§ 42.001-.076 (Vernon 1980). Section 42.075 provides for civil penalties to any person who:

(1) threatens serious harm to a child in a facility by violating a provision of this chapter or a department rule or standard;

(2) violates a provision of this chapter or a department rule or standard three or more times within a 12-month period; or

(3) places a public advertisement for an unlicensed facility.

65. See *Oxford v. Hill*, 558 S.W.2d 557, 559 (Tex. Civ. App.—Austin 1977, writ ref'd).

66. 401 U.S. 37 (1971).

67. *Id.* at 54.

68. See *Corpus Christi Peoples' Baptist Church, Inc. v. Texas Dep't of Human Resources*, 481 F. Supp. 1101, 1107-11 (S.D. Tex. 1979).

69. *Roloff Evangelistic Enterprises, Inc. v. State*, 598 S.W.2d 697, 700-01 (Tex. Civ. App.—Austin 1980, no writ).

70. *Id.* at 701-02. A home is subject to the provisions of the Child Care Licensing Act only if it provides "care, training, education, custody, treatment or supervision" to a child who is under 18 years of age. TEX. HUMAN RES. CODE ANN. §§ 42.002(1), (3) (Vernon 1980).

71. *May v. Anderson*, 345 U.S. 528, 534 (1953).

72. 602 S.W.2d 591 (Tex. Civ. App.—Waco 1980, no writ).

73. *Id.* at 596.

74. 597 S.W.2d 6 (Tex. Civ. App.—Beaumont 1980, no writ).



assumed jurisdiction in a divorce and conservatorship suit when only the husband was before the court and his connection with Texas was through military service.<sup>75</sup> The wife and children had never been in the state, but because the wife was served and filed no answer, the trial court granted the divorce and gave the husband conservatorship in a default judgment.<sup>76</sup> The wife then filed for a writ of error, which the appellate court found constituted a general appearance.<sup>77</sup> The court affirmed the divorce, and because the court now had personal jurisdiction, reversed and remanded as to conservatorship.<sup>78</sup> Under these circumstances the court might have instructed the trial court to refrain from attempting to resolve the issue of conservatorship in that the children were not in Texas and certainly were not brought before the court by their mother's "general appearance."

Grandparents may wish to be appointed managing conservators when their grandchildren become orphans, and a problem arises when both sets of grandparents petition to be so named. Because a conservatorship contest often occurs in relation to the settlement of an estate, it generally is brought as a guardianship application under the Probate Code.<sup>79</sup> The Probate Code guardianship provisions, however, are more concerned with property than with people and do not focus as strongly on the best interests of the child as do the provisions of the Family Code. In *Chapa v. Hernandez*,<sup>80</sup> however, the trial court and jury were able to surmount this difficulty and make findings based on the best interests of the child. The findings were sustained by the appellate court.<sup>81</sup> A misreading of the Family Code can also cause problems for grandparents, as was the case in *In re K.D.R.*<sup>82</sup> The trial court rendered judgment on an instructed verdict against the grandparents on the basis that a person who is not a parent cannot be appointed managing conservator without a termination of the parent-child relationship.<sup>83</sup> The appellate court correctly found this to be a misreading of the law and pointed out that a proceeding for appointment of a managing conservator may be conducted between private parties without any state involvement.<sup>84</sup> The case was reversed and remanded.<sup>85</sup>

When a proper bill of review is brought in connection with divorce and conservatorship, a default judgment will be set aside. In *Vinklerek v. Vin-*

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75. *Id.* at 8. Military personnel who have been stationed in Texas for six months are considered Texas domiciliaries for the purpose of bringing suit for divorce. See TEX. FAM. CODE ANN. § 3.23 (Vernon 1975).

76. 597 S.W.2d at 7.

77. *Id.* at 9.

78. *Id.*

79. See TEX. PROB. CODE ANN. §§ 108-127A (Vernon 1980).

80. 587 S.W.2d 778, 780-81 (Tex. Civ. App.—Corpus Christi 1979, no writ).

81. *Id.* at 781.

82. 590 S.W.2d 176 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

83. *Id.* at 178.

84. *Id.* at 179. See also TEX. FAM. CODE ANN. §§ 14.01, .07 (Vernon 1975 & Supp. 1980-1981) (court has discretion to appoint managing conservator based upon best interests of child).

85. 590 S.W.2d at 179.

*klarek*<sup>86</sup> the appellate court, because of the remarriage of both parties, reversed the trial court's summary judgment denying the bill.<sup>87</sup> The court pointed out that the divorce was final because neither party could complain of the other's remarriage, but because the appellant had not otherwise accepted the fruits of the original judgment, the court held that the conservatorship and property issues could be relitigated.<sup>88</sup>

Winning by default is one method of assuring custody, and another is thought to be the "home court advantage," a strategy apparent in *In re Marriage of Allen*.<sup>89</sup> The wife in *Allen* had left her husband and moved with her children to her parents' home in a neighboring county. As soon as possible, but before she could comply with the residence requirements for a divorce,<sup>90</sup> she filed a suit affecting the parent-child relationship.<sup>91</sup> Four days later the husband filed suit for divorce in the county of his residence, which was also the marital domicile. He then went to the wife's court and moved that her case be moved to his court so that all the matters would be consolidated in one suit. Under the Family Code such a transfer is mandatory when there is a divorce suit pending elsewhere.<sup>92</sup> Prior to the hearing on the motion to transfer, the wife amended her parent-child relationship suit into a divorce suit, although she admitted that she had not yet met the residence requirements. She then filed a motion in the husband's court to abate the divorce action. Neither court granted either transfer motion, and both courts ultimately entered final judgments of divorce.<sup>93</sup> No appeal was taken from the wife's judgment, but the wife appealed the husband's judgment. The appellate court found that when the husband filed his suit for divorce, the court in which he filed obtained dominant jurisdiction over the suit and the wife's court was immediately deprived of jurisdiction of everything except the motion to transfer, which, under the circumstances, was a ministerial act.<sup>94</sup> The court ruled that the wife's attempt to change her parent-child relationship suit to a divorce suit when she could not comply with the residency requirements was unsuccessful, because such an action would constitute forum shopping.<sup>95</sup> If the county residency requirements for divorce are to have any meaning, this is the right result; otherwise parties can establish jurisdiction for divorce merely by moving their children from one county to another.

After a hearing on the merits in a divorce conservatorship suit, the court

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86. 596 S.W.2d 197 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

87. *Id.* at 200.

88. *Id.* at 199-200.

89. 593 S.W.2d 133 (Tex. Civ. App.—Amarillo 1979, no writ).

90. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975) provides: "No suit for divorce may be maintained *unless at the time suit* is filed the petitioner or the respondent has been . . . a resident of the county in which the suit is filed for the *preceding ninety-day period*." (Emphasis added.)

91. *Id.* § 11.04(a) provides: "[A] suit affecting the parent-child relationship shall be brought in the county *where the child resides*." (Emphasis added.)

92. *Id.* § 3.55(c).

93. 593 S.W.2d at 136.

94. *Id.* at 137-38.

95. *Id.* at 137 n.4.

may award managing conservatorship to either parent<sup>96</sup> or to grandparents,<sup>97</sup> so long as the decision is in the child's best interest. In addition to deciding the question of conservatorship, the court can enjoin the managing conservator from taking the child out of the state without the written permission of the court,<sup>98</sup> or require an out-of-state possessory conservator to post bond before allowing the out-of-state visit.<sup>99</sup> To reach its conclusions concerning conservatorship, the court may rely on expert witnesses, and it is not necessarily an abuse of discretion to find that a court investigator is such an expert.<sup>100</sup> A court should not designate a temporary managing conservator after a final divorce decree has been rendered because temporary orders are unnecessary under the continuing jurisdiction provisions of the Family Code.<sup>101</sup> The Texas Supreme Court will issue a writ of mandamus to facilitate a transfer when a transfer is denied by this designation.<sup>102</sup>

The Texas Supreme Court also continues to enforce by mandamus the habeas corpus provisions of the Family Code<sup>103</sup> when the lower courts fail to follow the law,<sup>104</sup> but some remedy may have to be devised for a case like *Zeissig v. Zeissig*.<sup>105</sup> In that case the trial court granted a writ of habeas corpus for possession of three children to their mother, a Chilean domiciliary, without giving the respondent father an opportunity to appear or be heard. The writ was served and the children were brought to court, and on the same day another hearing was held, again without the respondent. The appellate court dismissed the appeal on the basis that a writ of habeas corpus is not appealable even if it is obtained without due pro-

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96. See *Hamilton v. Hamilton*, 592 S.W.2d 86 (Tex. Civ. App.—Fort Worth 1979, no writ) (conservatorship granted to father and appeal denied; mother first raised the issue of no conference with child over 12 years of age at time of motion for new trial; raising issue at that time was too late); *Altamirano v. Altamirano*, 591 S.W.2d 336 (Tex. Civ. App.—Corpus Christi 1979, no writ) (managing conservatorship granted to father); *Baker v. Baker*, 588 S.W.2d 677 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (conservatorship granted to mother and appeal dismissed because father had absconded from state with the child and continued to hold the child).

97. See *Camp v. Camp*, 591 S.W.2d 578 (Tex. Civ. App.—Fort Worth 1979, no writ).

98. See *Brock v. Brock*, 586 S.W.2d 927 (Tex. Civ. App.—El Paso 1979, no writ) (father named managing conservator of older children and mother named managing conservator of youngest, subject to an injunction on removing child from the state). See also *Wash v. Menn*, 588 S.W.2d 637 (Tex. Civ. App.—Beaumont 1979, writ dismissed) (mother, after court hearing, properly was granted permission to remove child from the state).

99. *In re Marriage of Miller*, 600 S.W.2d 386, 388-89 (Tex. Civ. App.—Amarillo 1980, no writ).

100. *Bell v. Bell*, 593 S.W.2d 424, 426 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

101. TEX. FAM. CODE ANN. § 11.05(a) (Vernon Supp. 1980-1981) provides: "[W]hen a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing jurisdiction of all matters provided for under this subtitle in connection with the child . . . ."

102. See *Brines v. McIlhane*, 596 S.W.2d 519 (Tex. 1980). See also *Brad v. Baker*, 591 S.W.2d 457 (Tex. 1980) (trial court ordered to grant motion to transfer the proceedings to the county of the children's residence).

103. TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1980-1981).

104. See *Forbes v. Wettman*, 598 S.W.2d 231 (Tex. 1980); *Gray v. Rankin*, 594 S.W.2d 409 (Tex. 1980); *Elliott v. Bradshaw*, 587 S.W.2d 108 (Tex. 1978).

105. 600 S.W.2d 353 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

cess.<sup>106</sup> The court held that *Gray v. Rankin*<sup>107</sup> is dispositive of the issue of jurisdiction.<sup>108</sup>

A successful motion to modify managing conservatorship must be based on a substantial change in circumstance as well as on the best interests of the child.<sup>109</sup> If no change in circumstance is proven, the motion will be denied.<sup>110</sup> A consent judgment based on an agreement to modify is not proper when one of the parties has repudiated the agreement prior to the rendition of the judgment.<sup>111</sup> The change will not be sustained unless there is other evidence to support the judgment.<sup>112</sup>

*Alston v. Rains*<sup>113</sup> concerns the problem of two different custody decrees granted by two different states. The first decree was in Texas, granting a divorce and conservatorship to the mother, who is blind. The second was in Arkansas with all parties before the court, and the court appointed the maternal grandparents permanent guardians of the child. When the child was brought to Texas for a visit, pursuant to the Arkansas decree, the mother obtained a writ of habeas corpus. At the hearing on the writ the trial court refused to recognize the Arkansas decree and ordered that the mother maintain custody based on the earlier Texas decree.<sup>114</sup> The writ was appealed, and the appellate court reversed, finding that the trial court should have granted full faith and credit to the Arkansas decree.<sup>115</sup> This case arose before *Gray v. Rankin*,<sup>116</sup> and the appeal should have been dismissed. Under present Texas law the merits of conservatorship should not have been tested by way of a writ of habeas corpus, but rather through a hearing on modification of the Arkansas decree. This would have necessitated a showing of a change in circumstances of the maternal grandparents

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106. *Id.* at 356-57.

107. 594 S.W.2d 409 (Tex. 1980). In *Gray* the Texas Supreme Court held that the courts of civil appeals do not have jurisdiction in habeas corpus cases concerning the conservatorship of children. *Id.* at 409. The Family Code does not list the granting or denying of habeas corpus among those orders from which an appeal may be taken. See TEX. FAM. CODE ANN. § 11.19(b)(2) (Vernon 1975).

108. 600 S.W.2d at 357.

109. See *Barron v. Bastow*, 601 S.W.2d 213 (Tex. Civ. App.—Austin 1980, writ dismissed) (managing conservatorship changed from father to mother); *Thibodeaux v. Forse*, 592 S.W.2d 663 (Tex. Civ. App.—Beaumont 1979, writ refused n.r.e.) (court approved changing managing conservatorship from mother to father because the father had been the de facto managing conservator and the children had been doing well in his home). See also *T.A.B. v. W.L.B.*, 598 S.W.2d 936 (Tex. Civ. App.—El Paso), writ refused n.r.e. per curiam, 606 S.W.2d 695 (Tex. 1980). In refusing the writ in *T.A.B. v. W.L.B.* the supreme court commented that although there was no reversible error in changing the managing conservatorship from the father to the mother, it did not approve the language of the court of civil appeals in stating that § 11.13(b) of the Family Code, on jury verdicts, prohibits an appellate court from considering properly raised no evidence points. 606 S.W.2d 695, 695 (Tex. 1980).

110. See, e.g., *Armstrong v. Armstrong*, 601 S.W.2d 724 (Tex. Civ. App.—Beaumont 1980, writ refused n.r.e.); *Caples v. Goodwin*, 601 S.W.2d 78 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

111. *Vineyard v. Vineyard*, 597 S.W.2d 21, 23 (Tex. Civ. App.—Dallas 1980, no writ).

112. *Id.*

113. 589 S.W.2d 481 (Tex. Civ. App.—Texarkana 1979, no writ).

114. *Id.* at 482.

115. *Id.* at 486.

116. 594 S.W.2d 409 (Tex. 1980); see note 107 *supra*.

such that the best interests of the child would be served by granting custody to the mother. The qualifications of the mother should not have been the sole issue in such a dispute.

At the time of divorce the rights of managing and possessory conservators are established, but as the children grow older their needs may change and this can necessitate a modification in the access rights of the parties. In *Little v. Little*<sup>117</sup> the court approved the modification of the rights of the possessory conservator based on a showing that the child needed a longer period in one place in order to participate in various sports programs.<sup>118</sup> *Oliver v. Boutwell*<sup>119</sup> involved not a change in age, but a change in location, and probably should also have resulted in some modification of the possessory conservator's rights. The issue never was litigated because the trial court sustained the wife's special appearance and dismissed the case. The couple had been divorced in 1975, and the wife had moved to Mississippi in 1977. With no other courts involved, the husband moved for a modification in 1978 in the original court, which dismissed the case.<sup>120</sup> The court of appeals reversed and remanded based on the long-arm statute<sup>121</sup> rather than on the obvious fact that the trial court was the court of continuing jurisdiction and that the purpose of the suit was merely to modify an existing decree.<sup>122</sup>

Grandparents are accorded some right to access under the provisions of the Texas Family Code.<sup>123</sup> In *In re L.L.K.*<sup>124</sup> the court dismissed the petition of the grandparents to be appointed possessory conservators when no managing conservator had been appointed.<sup>125</sup> This holding followed the decision in *Barrientos v. Garza*,<sup>126</sup> which had held that in order to maintain suit there must be or have been some litigation concerning the parent-child relationship. Mere change in terminology is not dispositive of grandparents' rights, so the fact that a mother had been granted custody in a divorce entered prior to the enactment of the Family Code was held to be the same as appointment as managing conservator, and the grandparent could maintain a suit for access.<sup>127</sup> The right to maintain a suit, however, does not guarantee success, and in the particular case the appellate court held that the jury finding that it would be in the best interests of the child

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117. 590 S.W.2d 620 (Tex. Civ. App.—Tyler 1979, no writ).

118. *Id.* at 623-24.

119. 601 S.W.2d 393 (Tex. Civ. App.—Dallas 1980, no writ).

120. *Id.* at 394.

121. TEX. FAM. CODE ANN. § 11.05 (Vernon Supp. 1980-1981).

122. 601 S.W.2d at 398.

123. TEX. FAM. CODE ANN. § 14.03(d) (Vernon Supp. 1980-1981) provides that "[t]he court may grant reasonable visitation rights to either the maternal or paternal grandparents of the child and issue any necessary orders to enforce said decree."

124. 591 S.W.2d 626 (Tex. Civ. App.—Amarillo 1979, no writ).

125. *Id.* at 629.

126. 559 S.W.2d 399, 400-01 (Tex. Civ. App.—Dallas 1977, no writ). *See also* Solender, *supra* note 63, at 167 (citing *Barrientos* for the proposition that the statutory provisions on the access of grandparents limit rather than expand the court's power).

127. *Dolman v. Dolman*, 586 S.W.2d 606, 608 (Tex. Civ. App.—Austin 1979, writ dismissed).

to grant the grandparent access was so contrary to the weight of the evidence as to be manifestly unjust.<sup>128</sup> *Markman v. Lachman*<sup>129</sup> was a suit brought by a father against his minor son's grandparents, natural mother, and stepfather. Apparently, the mother had remarried and removed the child from Texas. She concealed her whereabouts, and the father was unable to visit his child. Most of the parties were not amenable to service, and the maternal grandparents who were, were not shown to have entered into a conspiracy to deprive the father of the knowledge of their grandson's whereabouts. Accordingly, the trial court directed a verdict in their favor, and the appellate court affirmed.<sup>130</sup> This case and *Baker v. Baker*<sup>131</sup> demonstrate that although the courts may adjudicate parental rights, the rights become unenforceable if the parents decide to conceal the children's whereabouts. The recently enacted Parental Kidnapping Prevention Act of 1980<sup>132</sup> may help solve the problem.

### III. SUPPORT

The Texas Family Code provides that child support is the obligation of both parents.<sup>133</sup> Accordingly, when the father is named as managing conservator, the mother should be required to pay her fair share.<sup>134</sup> The problem, however, usually is not that of the mother paying a fair share, but rather that of the father, and courts in their original divorce decrees are attempting to be certain that fathers are given financial responsibility for their children. In two recent cases courts refused to hold that a father's lack of income would excuse his child support obligation when the father would have had greater earning power if he had chosen to exercise it.<sup>135</sup> A father's being on a veteran's pension and social security was also found to be an insufficient excuse for not contributing to the support of his children because "[t]he duty of a parent to support a child is not limited to current earnings but extends to his financial ability to pay from any and all sources that might be available."<sup>136</sup>

One appellate court, however, decided that the trial court's finding on

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128. *Id.* at 610.

129. 602 S.W.2d 350 (Tex. Civ. App.—Texarkana 1980, no writ).

130. *Id.* at 353.

131. 588 S.W.2d 677 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.); see note 96 *supra*.

132. Pub. L. No. 96-611, 94 Stat. 3566.

133. TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1980-1981) provides: "[E]ach parent has the duty to support his or her minor child . . . [and a] parent who fails to discharge the duty of support is liable to any person who provides necessities to those to whom support is owed."

134. *Grandinetti v. Grandinetti*, 600 S.W.2d 371, 372 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

135. See *In re Marriage of Miller*, 600 S.W.2d 386 (Tex. Civ. App.—Amarillo 1980, no writ) (father presently employed in a used auto parts store, but is a certified welder and has earned more than \$1,000 a month); *Cordell v. Cordell*, 592 S.W.2d 84 (Tex. Civ. App.—Texarkana 1979, no writ) (father who alleged he had no income because he was a full-time dental school student held to be capable of part-time employment to pay \$150 per month child support and should be required to pay part of ad litem fee).

136. *Musick v. Musick*, 590 S.W.2d 582, 586 (Tex. Civ. App.—Tyler 1979, no writ).

child support was excessive and required a remittitur of the overage.<sup>137</sup> The court based its holding on the "record as a whole"<sup>138</sup> and gave no specific reason for finding the amount excessive, even though the reformed decree would give the mother and child a smaller total monthly income, including her salary, than the father would keep for himself.<sup>139</sup>

The courts also are recognizing that child support can be given in non-monetary services as well as through financial support so that the monetary contributions need not be equal. In *Krempp v. Krempp*<sup>140</sup> this was the basis for upholding an award of \$1,000 a month in child support from the father, although the managing conservator mother had sizeable separate assets. Requiring as a part of the support obligation the payment of reasonable medical expenses in addition to a periodic or lump-sum payment also can be proper.<sup>141</sup> The medical payments are unenforceable by contempt, however, because they are not a sum certain, but they are enforceable as a matter of contract or as a debt.<sup>142</sup> Some forms of uncertainty are too great to support a judgment, and one appellate court reversed a trial court's award of support and conservatorship for an unborn child, holding that judgments should be based upon facts existing at the time of rendition.<sup>143</sup>

When a court, at the time of divorce, renders its decree dividing the property and setting child support, it expects that the parties will carry out the provisions of the decree. The courts are often wrong in this expectation as witnessed by the more than fifteen cases decided during the survey period involving habeas corpus because of nonsupport allegations.<sup>144</sup> Although courts cannot predict when a particular parent will default, *Colley v. Colley*<sup>145</sup> permitted an expectation of default to be taken into consideration by a trial court in the division of community property. There the trial court was sustained in its uneven division of the community property because it had concluded that there was "no reasonable expectation that appellant [father] would be faithful in his financial responsibilities to his child and that appellee [mother] must be prepared financially, in that

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137. *Fleming v. Fleming*, 595 S.W.2d 199, 202 (Tex. Civ. App.—Waco 1980, writ dismissed).

138. *Id.*

139. See Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 174 (1980) (substantiating that California courts are also guilty of creating this disparity between post-divorce income of husband and wife).

140. 590 S.W.2d 229 (Tex. Civ. App.—Fort Worth 1979, no writ). The father in *Krempp* had asserted that the \$1,000 per month child support would relieve the wife of any financial responsibility for the child, thus violating TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1980-1981) and TEX. CONST. art. I, § 3a (the equal rights amendment).

141. See *Robbins v. Robbins*, 601 S.W.2d 90 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). Appellant argued that only support payments that are "lump-sum" or "periodic" are allowed by TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975), and that reasonable medical expenses are not lump-sum or periodic. 601 S.W.2d at 93.

142. *Robbins v. Robbins*, 601 S.W.2d 90, 93 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *Ex parte Shelton*, 582 S.W.2d 637, 638 (Tex. Civ. App.—Dallas 1979, no writ).

143. *Tully v. Tully*, 595 S.W.2d 887, 889 (Tex. Civ. App.—Austin 1980, no writ).

144. See notes 156-85 *infra* and accompanying text.

145. 597 S.W.2d 30 (Tex. Civ. App.—Austin 1980, no writ).

event, to provide and care for the child."<sup>146</sup> The father had, apparently, never seen the child and had not paid any of the medical and hospital expenses in connection with its birth. At trial he said that he had had a change of heart and was going to take an interest in the child. The appellate court agreed that the trial court did not have to believe the father.<sup>147</sup> A similar lack of belief in the promises of the father probably explains the trial court's property division in *Campbell v. Campbell*.<sup>148</sup> In *Campbell* the trial court made an unequal division of the couple's separate property in order to provide for the children, and this was sustained by the appellate court.<sup>149</sup> The Texas Supreme Court at first appeared to reverse,<sup>150</sup> but then withdrew its opinion and set aside all the judgments, including those of the appellate and trial court, and remanded the case to the trial court.<sup>151</sup> The supreme court explained that there had been a settlement between the parties and so the matter was moot.<sup>152</sup>

*Young v. Young*<sup>153</sup> was another case wherein the trial court made an unequal division of the property in order to provide for a child born of the marriage. The appellate court's reversal stated that the fact that an adult disabled son was residing with and dependent on the wife could not be considered in the property division.<sup>154</sup> The Texas Supreme Court in reversing held that the Family Code does permit consideration of the rights of any children, including adult children, in a division of the estate of the parties.<sup>155</sup>

A parent who is in arrears on his child support obligations may be found in contempt and incarcerated. To be valid, a contempt order should be carefully tailored to the particular situation, and reliance on a printed form with blanks to be filled in can result in a finding that the commitment order is void for lack of specificity.<sup>156</sup> Oral contempt orders may be even less reliable than a printed form. In *Ex parte Perry*<sup>157</sup> the court found an

146. *Id.* at 32.

147. *Id.*

148. 586 S.W.2d 162 (Tex. Civ. App.—Fort Worth 1979), *vacated*, 24 Tex. Sup. Ct. J. 84 (Nov. 22, 1980).

149. 586 S.W.2d at 170.

150. 23 Tex. Sup. Ct. J. 391, 393 (June 4, 1980).

151. 24 Tex. Sup. Ct. J. 84, 84 (Nov. 22, 1980).

152. *Id.*

153. 594 S.W.2d 542 (Tex. Civ. App.—Dallas), *rev'd*, 24 Tex. Sup. Ct. J. 119 (Dec. 13, 1980).

154. 594 S.W.2d at 545.

155. 24 Tex. Sup. Ct. J. 119, 121-22 (Dec. 13, 1980); *see* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975).

156. *Ex parte Roy*, 595 S.W.2d 875, 877 (Tex. Civ. App.—Dallas 1980, no writ); *Ex parte Jenkins*, 593 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1980, no writ). *See also* *Fowler v. Stone*, 600 S.W.2d 351 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (divorce decree did not grant wife judgment against husband that she could execute against his assets; court found him in contempt for failure to pay child support).

157. 600 S.W.2d 357 (Tex. Civ. App.—Corpus Christi 1980, no writ). *But see Ex parte Rine*, 603 S.W.2d 268, 270 (Tex. Civ. App.—Waco 1980, no writ) (if an oral order is reduced to writing the same day, it is enforceable). *See also Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980) (order invalid when there was an 80-day delay between oral order and its reduction to writing).



oral order to be void, even though it had been reduced to writing seven days later.<sup>158</sup> A contempt order also becomes invalid and unenforceable when a judgment upon which the order is based is reversed by an appellate court.<sup>159</sup> Additionally, due process requires at a minimum that the relator be notified of his show cause hearing on a contempt motion, and failure to do so makes the contempt order void.<sup>160</sup> A contempt order based on a decree providing for support for children over eighteen is void as it would be imprisonment for a debt contrary to the Texas Constitution.<sup>161</sup> This results from the Family Code in that the Code does not require that children over the age of eighteen be supported.<sup>162</sup> Contempt, therefore, is not an appropriate remedy to enforce support for a child aged nineteen who is attending college.<sup>163</sup> Attorney's fees and court costs in connection with child support orders are enforceable by contempt<sup>164</sup> because they are a part of the cost of obtaining support. This is true despite the holding to the contrary in *Ex parte Provost*.<sup>165</sup>

In *Ex parte Payne*<sup>166</sup> the court granted a writ of habeas corpus because a father's imprisonment constituted double jeopardy.<sup>167</sup> The father had paid \$1,000 in order to purge himself; when the court found that he still owed \$4,257, however, it reincarcerated him even though he had not committed any new act of contempt.<sup>168</sup> The appellate court found that the father's incarceration violated the fifth amendment to the United States Constitution.<sup>169</sup> The opinion, however, is more interesting for its discussion of the problem of the statute of limitation as it pertains to child support.<sup>170</sup> At the moment it is not clear which of the Texas time limitations applies to an action for child support. One line of cases holds that child support actions are governed by the ten-year judgments statute.<sup>171</sup> The

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158. 600 S.W.2d at 358.

159. *Flowers v. Flowers*, 589 S.W.2d 746, 748 (Tex. Civ. App.—Dallas 1979, no writ).

160. *Ex parte Garza*, 593 S.W.2d 114, 118 (Tex. Civ. App.—Amarillo 1979, no writ). See also *Ex parte Jones*, 602 S.W.2d 400, 402 (Tex. Civ. App.—Waco 1980, no writ) (if husband receives notice and fails to appear allegedly because ex-wife said she was going to dismiss, the writ will be denied).

161. *In re Cobble*, 592 S.W.2d 46, 49 (Tex. Civ. App.—Tyler 1979, writ dismissed); see TEX. CONST. art. I, § 18, which provides: "No person shall ever be imprisoned for debt."

162. TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975) provides: "The court may order either or both parents to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age . . . ." But see *id.* § 14.05(b) (court may order payments after child reaches 18 years of age if child is mentally or physically disabled).

163. *In re Cobble*, 592 S.W.2d 46, 49 (Tex. Civ. App.—Tyler 1979, writ dismissed).

164. See *Ex parte Helms*, 152 Tex. 480, 486-87, 259 S.W.2d 184, 188-89 (1953); *Ex parte Rine*, 603 S.W.2d 268, 270 (Tex. Civ. App.—Waco 1980, no writ); *Ex parte Roy*, 595 S.W.2d 875, 877 (Tex. Civ. App.—Dallas 1980, no writ); *Ex parte McManus*, 589 S.W.2d 790, 792 (Tex. Civ. App.—Dallas 1979, no writ).

165. 598 S.W.2d 310, 311 (Tex. Civ. App.—Beaumont 1979, no writ).

166. 598 S.W.2d 312 (Tex. Civ. App.—Texarkana 1980, no writ).

167. *Id.* at 316.

168. *Id.*

169. *Id.*; see U.S. CONST. amend. V.

170. 598 S.W.2d at 318-19.

171. See, e.g., *Mitchell v. Mitchell*, 575 S.W.2d 311, 312 (Tex. Civ. App.—Dallas 1978, no writ) (citing TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958)); *Houtchens v. Matthews*, 557 S.W.2d 581, 585 (Tex. Civ. App.—Fort Worth 1977, writ dismissed).

Texas Supreme Court has held that child support is not a debt,<sup>172</sup> so the four-year debt limitation statute<sup>173</sup> would not apply. The court in *Payne* applied the catch-all limitation statute,<sup>174</sup> which is also four years, and then considered whether the statute would be tolled because of the minority of the child, the true party in interest.<sup>175</sup> The court concluded that it probably would not.<sup>176</sup> Because the duty of support is to the child,<sup>177</sup> this author suggests that whatever limitation statute is found to be applicable, it should be tolled during the minority of the child. There is also no reason that laches or a collusive agreement by the payee, who is generally the managing conservator of the child, should defeat the child's right to support. Although payment of back child support to a twenty-year-old will not eradicate the years of poverty caused by the earlier failure to pay, it should help the child overcome past deficiencies and may enable the child, as an adult, to become better educated.<sup>178</sup>

The problem of interpreting the powers of the transferee court, as a new court of continuing jurisdiction, finally was resolved this year.<sup>179</sup> In *Ex parte Barnett*<sup>180</sup> the Texas Supreme Court held that the transferee court as the new and, after transfer of the cause of action, the only court of continuing jurisdiction over all proceedings affecting the parent-child relationship has the power "to hear and decide pending and new contempt proceedings arising from the alleged failure to comply with orders of the transferring district court . . . regardless of whether all or some of the alleged contemptuous acts were committed before the transfer of the cause to the transferee court."<sup>181</sup> This holding was based on a finding that the Family Code requires all proceedings relating to the welfare of a child be in one court.<sup>182</sup> The court overruled all previous conflicting opinions.<sup>183</sup> The continuing jurisdiction rule also would apply to other support remedies such as reduction of unpaid arrearages to judgment.<sup>184</sup>

Another unresolved question is the status of unpaid temporary child support after the entry of the final divorce decree. In two cases Texas courts held that if the final decree does not modify the temporary orders,

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172. *Smith v. Bramhall*, 563 S.W.2d 238, 239 (Tex. 1978) (per curiam).

173. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon Supp. 1980-1981).

174. 598 S.W.2d at 319; see TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958).

175. 598 S.W.2d at 319; see TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1980-1981).

176. 598 S.W.2d at 319.

177. TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1980-1981); see note 133 *supra*.

178. See *Gibbs v. Giles*, 607 P.2d 118 (Nev. 1980) (child as a third-party beneficiary had a cause of action, and the statute of limitations was tolled during child's minority because otherwise child would be sacrificed by inaction of parent).

179. See *Solender*, *supra* note 50, at 176-77.

180. 600 S.W.2d 252 (Tex. 1980).

181. *Id.* at 255.

182. *Id.* at 255-56; see TEX. FAM. CODE ANN. § 11.06(h) (Vernon 1975).

183. 600 S.W.2d at 255; see, e.g., *Ex parte Gonzalez*, 111 Tex. 399, 238 S.W. 635 (1922). The *Barnett* court specifically disapproved *Ex parte Chandler*, 580 S.W.2d 12 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). 600 S.W.2d at 255.

184. See, e.g., *Chandler v. Mierendorf*, 590 S.W.2d 593 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

the past-due obligations are not nullified by the establishment of new and different future payments.<sup>185</sup> Accordingly, the relator may be confined after the rendition of the final decree until he has paid the arrearage based on the temporary orders.

In addition to using contempt, with its threat of incarceration, as a means of collecting unpaid child support, the unpaid amount can be reduced to a judgment and the arrearages collected by levying execution on whatever property the delinquent former spouse may have.<sup>186</sup> The remedy is one of right and should be granted even though contempt is also requested.<sup>187</sup> Failure to name a payee in a child support order does not prevent the managing conservator from obtaining a judgment,<sup>188</sup> but if the original decree is ambiguous and no extrinsic evidence is offered by way of explanation, a judgment should not be rendered.<sup>189</sup> The jurisdiction required to render a judgment may be obtained over a nonresident under the Family Code long-arm statute when the nonresident has sufficient contacts with Texas.<sup>190</sup> In *Crockett v. Crockett*<sup>191</sup> the parties were married in Texas, lived together in Texas for several years thereafter, and had children who were born in and were currently residents of Texas, and whom the respondent had visited in Texas. These facts provided sufficient contacts with Texas to support jurisdiction over the respondent despite the fact that the divorce had been obtained in Ohio and the respondent had been a resident of Ohio since 1974.<sup>192</sup> Although back child support is not a debt, because it can be reduced to judgment,<sup>193</sup> the death of a party owing child support arrearages does not prevent collection when there is an estate against which judgment can be rendered.<sup>194</sup> If the beneficiary of a spendthrift trust<sup>195</sup> fails to pay his support obligations, the proceeds may be garnished.<sup>196</sup>

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185. *Ex parte* Davis, 597 S.W.2d 501, 502 (Tex. Civ. App.—Dallas 1980, no writ); *Ex parte* Shaver, 597 S.W.2d 498, 500 (Tex. Civ. App.—Dallas 1980, no writ). *But see Ex parte* Grothe, 581 S.W.2d 296, 297 (Tex. Civ. App.—Austin 1979, no writ) (temporary orders superseded by entry of divorce decree).

186. *See* TEX. FAM. CODE ANN. § 14.09(c) (Vernon 1975).

187. *Frank v. Reese*, 594 S.W.2d 119, 122-23 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *McPherson v. Townsend*, 593 S.W.2d 430, 432 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

188. *Bastow v. Barron*, 603 S.W.2d 345, 346 (Tex. Civ. App.—Beaumont 1980, no writ).

189. *Richey v. Bolerjack*, 594 S.W.2d 795, 798-99 (Tex. Civ. App.—Tyler 1980, no writ). *But see Freeman v. Williams*, 596 S.W.2d 652, 653-54 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (court relied on similar language to determine that the intent of the parties was unambiguous).

190. *See* TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1980-1981).

191. 589 S.W.2d 759 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

192. *Id.* at 762.

193. *Adair v. Martin*, 595 S.W.2d 513, 515 (Tex. 1980).

194. *Id.*; *see Smith v. Brumhall*, 556 S.W.2d 112 (Tex. Civ. App.—Waco 1977), writ ref'd n.r.e. *per curiam*, 563 S.W.2d 238 (Tex. 1978).

195. A spendthrift trust is a trust "in which the beneficiary is prohibited from anticipating or assigning his interest in or income from the trust estate." *Long v. Long*, 252 S.W.2d 235, 246 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.). *See also First Bank & Trust v. Goss*, 533 S.W.2d 93 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

196. *Myrick v. Moody Nat'l Bank*, 590 S.W.2d 766, 768 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

The Uniform Reciprocal Enforcement of Support Act (URESA)<sup>197</sup> is being used with greater frequency and success. Registration of valid foreign support orders should be almost a routine matter in that such factors as requests for modification,<sup>198</sup> the present age of the child,<sup>199</sup> and even language concerning alimony<sup>200</sup> may not be considered by the responding court.<sup>201</sup> Moreover, the validity of the foreign decree is irrelevant to a URESA action because a father's duty of support is independent of a divorce decree.<sup>202</sup> Also, a child's alleged illegitimacy is often rebutted by the presumption that a child born of the marriage is legitimate and entitled to support.<sup>203</sup> Thus, a court should grant a continuance in a URESA action only when the plaintiff's and the defendant's financial status and the circumstances of the child are questioned.<sup>204</sup> When the defendant has had insufficient contacts with Texas for the Texas courts to obtain jurisdiction over the defendant, the plaintiff, in order to modify a foreign support decree, can either file in the original foreign court or use the URESA. In *Bergdoll v. Whitley*<sup>205</sup> the Texas court held that although basic considerations of fairness pointed to Tennessee as the forum for a suit to modify a child support decree,<sup>206</sup> the Texas plaintiff would not have to bring suit in Tennessee because both Texas and Tennessee had enacted the URESA.<sup>207</sup>

Because we are now in an era of double-digit inflation, the numerous requests for upward modification of child support decrees are not surprising. Modification is granted provided there is sufficient evidence of a material change of circumstances.<sup>208</sup> Evidence of change of circumstance can be as disparate as a rise in the cost of school lunches,<sup>209</sup> the unsuitability of a dwelling based on too few bedrooms for children of opposite sexes,<sup>210</sup> or a curtailment in the use of a country club.<sup>211</sup> Courts are taking judicial

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197. TEX. FAM. CODE ANN. §§ 21.01-.66 (Vernon 1975 & Supp. 1980-1981).

198. *Littrell v. Littrell*, 601 S.W.2d 207, 209 (Tex. Civ. App.—Beaumont 1980, no writ).

199. *Ackerman v. Yanoscik*, 601 S.W.2d 72, 73 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

200. *Parker v. Parker*, 593 S.W.2d 857, 859 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

201. The procedure for registration of foreign support orders is delineated at TEX. FAM. CODE ANN. §§ 21.61-.66 (Vernon 1975).

202. *Etchison v. Greathouse*, 596 S.W.2d 233, 235 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

203. See TEX. FAM. CODE ANN. §§ 4.02, 12.02(a) (Vernon Supp. 1980-1981).

204. See *id.* § 21.34 (Vernon 1975) (continuance should be granted only when "the plaintiff is absent from the responding state and the defendant presents evidence which constitutes a defense").

205. 598 S.W.2d 932 (Tex. Civ. App.—Austin 1980, no writ).

206. *Id.* at 935-36.

207. *Id.* at 936.

208. *Williams v. Williams*, 596 S.W.2d 245, 247-48 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (reversing and remanding because modification was based on surmise rather than on facts indicating a change in husband's income).

209. *Moreland v. Moreland*, 589 S.W.2d 828, 829-30 (Tex. Civ. App.—Dallas 1979, writ dismissed) (reversed and remanded because trial court had abused its discretion in denying an increase when there was evidence of change of income for both parties, one up, the other down, and an increase in child care costs).

210. *Matush v. Matush*, 601 S.W.2d 781, 782 (Tex. Civ. App.—Waco 1980, no writ).

211. *Cozby v. Cozby*, 597 S.W.2d 808, 809-10 (Tex. Civ. App.—Tyler 1980, no writ).

notice of inflation<sup>212</sup> and, when fathers are the managing conservators, are requiring mothers to contribute support even when their obligation is not mentioned in the original decree.<sup>213</sup> Because inflation is a material change of circumstances that is a basis for modification, the court in *Bagot v. Bagot*<sup>214</sup> allowed an increase in support even though the original decree mandated a subsequent built-in increase.<sup>215</sup> The court pointed out that changed circumstances include more than an increase in earning capacity.<sup>216</sup>

When the motion to modify a support decree does not give notice that the petitioned for increase will start with the date of the motion, a court should grant an increase only from the date of the hearing forward and not retroactive to the motion date.<sup>217</sup> Of course, circumstances also can change for the payor, and when his income declines steadily a court has held that the decree should be modified to decrease support payments despite the presence of savings that could be used to sustain the support level.<sup>218</sup> This decision is questionable, however, in that the decline was over only a seven-month period, and the child's needs did not change because of the payor's income loss.<sup>219</sup>

Unless a parent-child relationship has been established, the courts will not modify a support agreement.<sup>220</sup> *Mata v. Moreno*<sup>221</sup> raises many questions concerning the propriety of making settlements that affect the child without having the child represented. In 1973 the mother had sued for divorce, alleging a common law marriage and asking for child support for a child born of the marriage. During a hearing on the merits the parties agreed that the alleged father would pay child support of \$150 per month until the child reached eighteen years of age. The alleged father, however, would not admit paternity or the existence of a common law marriage. The court dismissed the mother's subsequent suit to modify the support order because the order was not based on a finding of a parent-child relationship.<sup>222</sup> The courts have held, however, that for children born prior to September 1, 1975, there is a common law right to establish paternity, and thus, the child in *Mata* could pursue this remedy and establish a parent-child relationship to obtain proper support.<sup>223</sup> This course of action would not be open to a child born after September 1, 1975, and this result adds to

212. *Bagot v. Bagot*, 602 S.W.2d 334, 336 (Tex. Civ. App.—Texarkana 1980, no writ).

213. *Carter v. Hall*, 589 S.W.2d 502, 504 (Tex. Civ. App.—Fort Worth 1979, writ dismissed); *Bradshaw v. Billups*, 587 S.W.2d 61, 62 (Tex. Civ. App.—Eastland 1979, no writ).

214. 602 S.W.2d 334 (Tex. Civ. App.—Texarkana 1980, no writ).

215. *Id.* at 336.

216. *Id.*

217. *Grundy v. Grundy*, 589 S.W.2d 776, 778 (Tex. Civ. App.—Dallas 1979, no writ).

218. *Watkins v. Austin*, 590 S.W.2d 830, 832 (Tex. Civ. App.—Dallas 1979, no writ).

219. The problem of considering the total assets of the parents when setting child support obligations needs to be more carefully scrutinized. See Solender, *supra* note 63, at 177.

220. See TEX. FAM. CODE ANN. § 14.08 (Vernon Supp. 1980-1981).

221. 601 S.W.2d 58 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

222. *Id.* at 59; see TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975).

223. See notes 37-41 *supra* and accompanying text.

the argument that the one-year statute of limitations is unconstitutional.<sup>224</sup>

#### IV. TERMINATION AND ADOPTION

The Texas Supreme Court, perhaps forecasting a ruling of the United States Supreme Court,<sup>225</sup> has established in *In re G.M.*<sup>226</sup> that the judgment to terminate involuntarily a person's parental rights must be based on clear and convincing evidence and not on the Texas Family Code standard of preponderance of the evidence.<sup>227</sup> The court based its holding on the rule it had enunciated in *State v. Addington*,<sup>228</sup> which concerned state proceedings to commit individuals to state mental hospitals for an indefinite period. The court stated that "[t]he right to enjoy a natural family unit is no less important than the right to liberty which requires at least a clear and convincing standard of proof to inhibit such liberty through involuntary and indefinite confinement in a mental institution."<sup>229</sup> The Texas Supreme Court also held in *Durham v. Barrow*<sup>230</sup> that after there has been a proper termination of their rights, the natural parents have no standing to bring a bill of review in connection with the subsequent adoption.<sup>231</sup> If, however, the termination is set aside, the parties to the termination may bring a bill of review against the adoption.<sup>232</sup>

The Family Code provisions for waiver of citation prior to the filing of a suit for termination<sup>233</sup> continue to be sustained,<sup>234</sup> and unless the provisions concerning grounds for termination are found to have been violated, there can be no termination of parental rights.<sup>235</sup> In *In re S.D.H.*<sup>236</sup> the father's parental rights were held not terminated because he had been imprisoned prior to the birth of the child; the court found that he did not violate the Texas Family Code, for he could not have voluntarily left the child.<sup>237</sup> The Family Code mandates the appointment of a guardian ad litem to represent the child when the child is not a petitioner and the other parties have interests such that they will not represent the child.<sup>238</sup> In *Sisk v. Duck*,<sup>239</sup> a case in which the father and the grandparents were fighting

224. See notes 31-35 *supra* and accompanying text.

225. See *Doe v. Delaware*, 100 S. Ct. 1336, 63 L. Ed. 2d 775 (1980).

226. 596 S.W.2d 846 (Tex. 1980).

227. *Id.* at 847; see TEX. FAM. CODE ANN. § 11.15 (Vernon 1975).

228. 588 S.W.2d 569 (Tex. 1979).

229. 596 S.W.2d at 847.

230. 600 S.W.2d 756 (Tex. 1980). See also Solender, *supra* note 50, at 182.

231. 600 S.W.2d at 760.

232. *Id.*

233. TEX. FAM. CODE ANN. § 15.02(1)(K) (Vernon Supp. 1980-1981).

234. See *In re B.B.F.*, 595 S.W.2d 873 (Tex. Civ. App.—San Antonio 1980, no writ).

235. See TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980-1981).

236. 591 S.W.2d 637 (Tex. Civ. App.—Eastland 1980, no writ). See also *Allred v. Lowrey*, 597 S.W.2d 353 (Tex. 1980) (prisoner-father seeking to appeal termination of his parental rights received writ of mandamus to order authorization of appeal on basis of inability to pay costs).

237. 591 S.W.2d at 638; TEX. FAM. CODE ANN. §§ 15.02(1)(A), (B) (Vernon Supp. 1980-1981).

238. TEX. FAM. CODE ANN. § 11.10(a) (Vernon 1975).

239. 593 S.W.2d 416 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

over the custody of the child, the court reversed and remanded because no one acted as guardian ad litem for the child.<sup>240</sup> While a guardian ad litem is important for the representation of the child, his powers are limited, and it was error for a trial court to direct the guardian ad litem to file suit in federal court in connection with an alleged violation of the child's civil rights.<sup>241</sup>

The courts often resist terminating parental rights, even if the parent does not have custody and does not contribute regularly to the child's support. The managing conservator spouse may have remarried, and the new spouse may wish to adopt the child; such a situation gives rise to a number of petitions for intra-familial terminations and adoptions. The spouse who wishes to arrange for the termination of the other spouse's parental rights must demonstrate that there has been a failure of support commensurate with ability to pay during a period of one year ending within six months of the date of the filing of the petition.<sup>242</sup> The court in *Brazier v. Brazier*<sup>243</sup> determined that the statutory date of the filing of a petition to terminate parental rights in a case with multiple amended petitions is the date to which the final petition relates back.<sup>244</sup> In *Brazier* a petition for divorce was filed, and in the first amended petition a termination of parental rights was requested. The third amended petition supplanted and superseded all prior petitions, but it included the request to terminate parental rights and so it was held to relate back.<sup>245</sup> In the case of *In re T.B.S.*<sup>246</sup> the court found that the father had paid support up to within eleven months of the filing of the petition and so reversed and remanded.<sup>247</sup> In *Craddock v. Worley*<sup>248</sup> the court held that there was no evidence that the father had the ability to support the child and thus reversed and remanded.<sup>249</sup>

*In re S.R.M.*<sup>250</sup> involved a third party who wanted to terminate the parental rights of a divorced mother in order to adopt her child. The appellate court agreed with the trial court that there was insufficient evidence to support the allegations in the pleadings and also held that a termination based on unpleaded grounds would be a denial of due process.<sup>251</sup> The court further found that the mother had not failed to support the child in accordance with her ability, and reversed and rendered judgment.<sup>252</sup> When, however, it can be proved that a father has not supported his child according to his ability and that it would be in the best interests of the

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240. *Id.* at 417.

241. *Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida*, 596 S.W.2d 947, 951 (Tex. Civ. App.—Fort Worth 1980, no writ).

242. TEX. FAM. CODE ANN. § 15.02(1)(F) (Vernon Supp. 1980-1981).

243. 597 S.W.2d 442 (Tex. Civ. App.—Beaumont 1980, no writ).

244. *Id.* at 444.

245. *Id.*

246. 601 S.W.2d 539 (Tex. Civ. App.—Tyler 1980, no writ).

247. *Id.* at 542-43.

248. 601 S.W.2d 445 (Tex. Civ. App.—Dallas 1980, no writ).

249. *Id.* at 447-48.

250. 601 S.W.2d 766 (Tex. Civ. App.—Amarillo 1980, no writ).

251. *Id.* at 769-70.

252. *Id.* at 771.

child to terminate the father's parental rights, a court will grant the termination and permit the stepfather to adopt despite the protests of the father.<sup>253</sup> The court in *Matthews v. Simmons*<sup>254</sup> reversed and remanded because, as it pointed out, a judgment that both terminated the father's parental rights and appointed the father possessory conservator was so inconsistent as to be nullified.<sup>255</sup> This judgment by the trial court represents an unfortunate commentary on the understanding by trial court judges of the meaning of a termination of parental rights.<sup>256</sup> As the Texas Supreme Court said in *In re G.M.*,<sup>257</sup> "[t]ermination is a drastic remedy and is of such weight and gravity that due process requires . . . [justification] by proof more substantial than a preponderance of the evidence."<sup>258</sup> Quoting the United States Supreme Court, the court further stated: "The standard serves . . . to indicate the relative importance attached to the ultimate decision."<sup>259</sup>

Intra-family disputes over children give rise to many complications, but even in this area contempt judgments are void without adequate notice and a hearing.<sup>260</sup> When the parents of the children are dead and two families seek to adopt so as to oust the other from any relationship with the children, the situation becomes even more complex and may not be resolvable. In *Remling v. Green*<sup>261</sup> the basis for the decision was a social study report that recommended adoption by one set of grandparents. The study was conducted at the direction of the court in accordance with the statute<sup>262</sup> and was filed with the court on the date of the adoption hearing. The report was not entered into evidence, and the investigator was not called to testify. Nevertheless, the trial court considered the social study in making its determination. The court of civil appeals reversed and remanded on the grounds that the social study should not have been used by the trial court in reaching its decision,<sup>263</sup> but the Texas Supreme Court held that because the statute mandates such a study, and because there was knowledge of the filing of the study and no objection to it was raised at the trial, the trial court should have considered it.<sup>264</sup> The court pointed out that to deny the trial court access to a mandated study would subvert the intent of the statute.<sup>265</sup> The issue of court ordered access by persons other

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253. *Memmer v. Anderson*, 593 S.W.2d 143, 145 (Tex. Civ. App.—Waco 1980, no writ).

254. 589 S.W.2d 156 (Tex. Civ. App.—Tyler 1979, no writ).

255. *Id.* at 159.

256. See Solender, *supra* note 63, at 183.

257. 596 S.W.2d 846 (Tex. 1980).

258. *Id.* at 847. See also *Barrow v. Durham*, 574 S.W.2d 857 (Tex. Civ. App.—Corpus Christi 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980); Solender, *supra* note 50, at 182.

259. 596 S.W.2d at 847 (emphasis omitted) (quoting *Addington v. State*, 441 U.S. 418 (1979)).

260. *Ex parte Standard*, 596 S.W.2d 218, 220 (Tex. Civ. App.—Texarkana 1980, no writ).

261. 601 S.W.2d 84 (Tex. Civ. App.—Houston [1st Dist.] 1980), *rev'd*, 24 Tex. Sup. Ct. J. 81 (Nov. 19, 1980).

262. TEX. FAM. CODE ANN. § 16.031(a) (Vernon Supp. 1980-1981).

263. 601 S.W.2d at 87.

264. 24 Tex. Sup. Ct. J. 81, 84 (Nov. 19, 1980).

265. *Id.*



than grandparents, such as aunts and uncles, was not addressed. The supreme court merely reversed the appellate court on the social study issue; other matters were remanded to the trial court.<sup>266</sup>

The state is often the moving party in suits to terminate parental rights. The state may intervene in cases of alleged child abuse, but the judgment must be clear as to the grounds and should not be phrased in the disjunctive.<sup>267</sup> If the evidence of danger to the child's emotional well-being is sufficient, termination of parental rights can also be effected.<sup>268</sup> If the evidence is not sufficiently clear and convincing, however, there can be no termination.<sup>269</sup> In protecting the children, the state, not being a human person, places the children in the care of foster parents until the situation can be clarified. This is often done by an order naming the foster parents as temporary managing conservators, which is an interlocutory order and is not appealable.<sup>270</sup> If the foster parents become attached to their charges and decide to petition to adopt, they have standing to do so.<sup>271</sup>

The Texas Supreme Court in *In re T.E.T.*<sup>272</sup> has again addressed the question of the distinction between fathers and mothers in connection with the right to legitimate their natural children.<sup>273</sup> This is an important issue because without a legal connection with the child a parent would have no standing to contest its placement or its adoption.<sup>274</sup> Under the Family Code a child born out of wedlock is legitimate as to its mother,<sup>275</sup> but the natural father must take affirmative action before the child can be legitimate as to him.<sup>276</sup> One of the requirements for voluntary legitimation is the consent of the mother or the managing conservator,<sup>277</sup> or a court finding that it is in the best interests of the child that he be legitimated despite the mother's or managing conservator's failure to consent.<sup>278</sup> This distinc-

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266. *Id.*

267. *W.H. v. Moore*, 589 S.W.2d 830, 831 (Tex. Civ. App.—Dallas 1979, no writ); *see W.H. v. Moore*, 591 S.W.2d 645 (Tex. Civ. App.—Dallas 1979, no writ) (held, after remand, that the grounds alleged were sufficient for termination). *See also* *Matthews v. Simmons*, 589 S.W.2d 156, 159 (Tex. Civ. App.—Tyler 1979, no writ).

268. *See Melton v. Dallas County Child Welfare Unit*, 602 S.W.2d 119 (Tex. Civ. App.—Dallas 1980, no writ); *In re Sneed*, 592 S.W.2d 430 (Tex. Civ. App.—Fort Worth 1979, no writ).

269. *See In re Hare*, 599 S.W.2d 856 (Tex. Civ. App.—Texarkana 1980, no writ); *Chesser v. Texas Dep't of Human Resources*, 595 S.W.2d 615 (Tex. Civ. App.—Corpus Christi 1980, no writ).

270. *In re T.R.*, 596 S.W.2d 953, 955 (Tex. Civ. App.—Fort Worth 1980, no writ).

271. *Harris County Child Welfare Unit v. Caloudas*, 590 S.W.2d 596, 599 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

272. 603 S.W.2d 793 (Tex. 1980).

273. This issue was first addressed in *In re K.*, 535 S.W.2d 168 (Tex.), *cert. denied*, 429 U.S. 1010 (1976).

274. *See In re C.D.V.*, 589 S.W.2d 543 (Tex. Civ. App.—Amarillo 1979, no writ), in which the court granted an adoption after denying the biological father's petition for voluntary legitimation. The trial court also terminated the parental rights of the father, and the appellate court pointed out that this was superfluous because there were no rights to terminate. *Id.* at 547.

275. TEX. FAM. CODE ANN. § 12.01 (Vernon 1975).

276. *Id.* § 12.02(c).

277. *Id.* § 13.21(b)(3) (Vernon Supp. 1980-1981).

278. *Id.* § 13.21(c).

tion between the sexes has led to the belief, by some, that the present Family Code provisions are unconstitutional. The Texas Supreme Court reviewed all the recent United States Supreme Court decisions on the subject<sup>279</sup> and distinguished them on the basis that the fact situations in those cases involved fathers with long-term relationships with their children, whereas in the case before it, the father had never had possession of the child.<sup>280</sup> The Texas Supreme Court then held that the Texas statute does not violate the equal protection clause of the fourteenth amendment.<sup>281</sup> Three justices dissented,<sup>282</sup> based on the claim that there was a misreading of the Supreme Court opinions by the majority and further that the court had not considered the effect of the Texas equal rights amendment on a gender-based distinction.<sup>283</sup>

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279. *Caban v. Mohammad*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

280. 603 S.W.2d at 797-98.

281. *Id.* at 798.

282. *Id.*

283. *Id.* at 801; *see* TEX. CONST. art. I, § 3a, which provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."

